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No. 04-905

IN THE

Supreme Court of the United States

VOLVO TRUCKS NORTH AMERICA, INC.,
Petitioner,

v.

REEDER-SIMCO GMC, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE TRUCK MANUFACTURERS ASSOCIATION, THE NATIONAL ASSOCIATION OF MANUFACTURERS, THE FARM EQUIPMENT MANUFACTURERS ASSOCIATION, THE ASSOCIATION OF EQUIPMENT MANUFACTURERS, TRUCK TRAILER MANUFACTURERS ASSOCIATION, AND THE BUSINESS AND INSTITUTIONAL FURNITURE MANUFACTURER'S ASSOCIATION INTERNATIONAL AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF THE TRUCK MANUFACTURERS ASSOCIATION, THE NATIONAL ASSOCIATION OF MANUFACTURERS, THE FARM EQUIPMENT MANUFACTURERS ASSOCIATION, THE ASSOCIATION OF EQUIPMENT MANUFACTURERS, TRUCK TRAILER MANUFACTURERS ASSOCIATION, AND THE BUSINESS AND INSTITUTIONAL FURNITURE MANUFACTURER'S ASSOCIATION INTERNATIONAL AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

"I have difficulty in knowing where we are with this, and I should think the people who are trying to do business would find it much more troublesome than we do, for it does not trouble me more than once a term, but it must trouble them every day."

— Justice Jackson[2]

Amici curiae are interested in this case because the Eighth Circuit's decision threatens to impede substantially their members' ability to engage in interbrand competition by offering price discounts to their resellers.

The Eighth Circuit concluded that manufacturer discounts might violate the Robinson-Patman Act even when given to resellers that are competing only against resellers of other brands. In reaching that conclusion, the Eighth Circuit

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[1] By letters filed with the Clerk of the Court, Petitioner and Respondent have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, *amici curiae* state that the brief was prepared in its entirety by *amici curiae* and their counsel. No monetary contribution toward the preparation or submission of this brief was made by any person other than *amici curiae*, their members, and their counsel.

[2] *Standard Oil Co. v. FTC*, 340 U.S. 231 (1951), Transcript of Oral Argument, Oct. 9, 1950, p. 88 (as quoted in FREDERICK M. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT xi (1962)).

misapplied the Act in a manner that will hinder competition and raise prices to consumers in the truck market involved in this case, as well as in markets for many other types of products sold by *amici*'s members. As explained in the sections that follow, while manufacturers employ the type of discounts at issue to increase *inter*brand competition, those discounts do not lessen *intra*brand competition—and the lessening of such competition is a required element of a Robinson-Patman Act claim based on a manufacturer's prices to its resellers.

The individual interests of *amici curiae* are as follows:

The Truck Manufacturers Association ("TMA") is a not-for-profit corporation whose members include all of the major North American manufacturers of medium-duty and heavy-duty trucks (greater than 19,500 pounds gross vehicle weight rating). TMA's members include Ford Motor Company, Freightliner LLC, General Motors Corporation, International Truck and Engine Corporation, Isuzu Motors America, Inc., Mack Trucks, Inc., PACCAR Inc., and Petitioner, Volvo Trucks North America, Inc. ("Volvo").

National Association of Manufacturers ("NAM") is the United States' largest industrial trade association, representing small and large manufacturers in every industrial sector and in all fifty states. NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to economic growth and to increase understanding among policymakers, the media, and the public about the vital role of manufacturing to America's economic future and living standards.

The Farm Equipment Manufacturers Association ("FEMA") is a not-for-profit corporation composed of over 650 United States and Canadian companies that are engaged in the manufacture and sale of specialty farm equipment, as well as companies that supply those manufacturers. FEMA operates to enhance the specialty farm equipment manufacturing industry by, among other things, providing industry leadership and business opportunities to its members.

The Association of Equipment Manufacturers ("AEM") is a nonprofit corporation. Its members include the major manufacturers of equipment used worldwide in the construction, agricultural, mining, forestry, and utility industries. AEM members produce a wide variety of equipment, from large earthmovers and agricultural equipment to smaller hand-held, portable and walk-behind machinery designed to handle a wide variety of specialized tasks. Its members also produce components used by these equipment manufacturers, such as engines, transmissions, hydraulic equipment, and electronic controls; as well as provide services to these dynamic industries.

The Truck Trailer Manufacturers Association ("TTMA") is an international trade association composed of manufacturers of truck trailers, tank trailers, cargo containers, cargo tanks for trucks, and container chassis. TTMA's members manufacture over ninety percent of the total annual production of those units in the United States. These manufacturers range in size from those selling over 50,000 units per year to those that sell less than 1000 units. In addition, over 100 of these manufacturers' major material and component suppliers are TTMA associate members. TTMA's purpose is to establish confidence between these manufacturers and their suppliers in order to bring about a mutual understanding of the problems confronting the industry.

The Business and Institutional Furniture Manufacturer's Association International ("BIFMA") is a not-for-profit trade association of furniture manufacturers and suppliers. BIFMA has 260 members, 145 of which are office furniture manufacturers. BIFMA's mission is to serve the North American office, business and institutional furniture manufacturing industry by providing industry information, advocating for the industry's interests, and offering industry-wide trade development opportunities.

Amici's Use of Differential Discounts to Promote Interbrand Competition

1. The market for medium-duty and heavy-duty trucks. Unlike automobiles, medium-duty and heavy-duty trucks are rarely bought "off the lot." Most trucking company purchasers operate fleets, varying from only a few trucks to several thousand. These fleets serve a variety of uses, including over-the-road cargo hauling, and vocational applications, such as construction or logging. By the late 1990s, large purchasers (more than 100 trucks per year) comprised about a third of the market, midsized buyers (ten to ninety-nine trucks a year) just under a quarter, and only the remainder was composed of small purchasers (less than ten a year).[3]

Truck manufacturers aggressively market their products in many ways, including providing their dealers with additional discounts on multiple truck deals to win business away from other manufacturers. Because the manufacturers have comparable product offerings, often the main competitive battle is over price, with the result being that customers obtain lower prices.

Because of the diversity of jobs for which these trucks are used, manufacturers offer a myriad of options for, among other things, engines, transmissions, axles, and cab configurations. Buyers generally purchase trucks "made to order" from dealers who most often maintain close relationships with their customers.[4] Because competition among truck manufacturers is fierce, truck buyers typically approach dealers of several brands before making a purchase. The prospective purchasers provide their specifications to the dealers

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[3] Michael E. Porter & Örjan Sölvell, *Volvo Trucks (A): Penetrating the U.S. Market*, HARV. BUS. SCH. PUB. (Rev. Mar. 31, 2004), *available at* http://www.hbsp.harvard.edu/b02/en/common/item_detail.jhtml?id=702418.

[4] *Id.*

and select the dealer (and its manufacturer) that gives the best terms. The manufacturer then builds its truck "from the ground up."

Manufacturers set the price at which they will sell trucks to their dealers case by case. For each prospective purchase, the dealer works with the potential buyer and finds out as much information as possible about its needs and circumstances. The dealer learns the buyer's specifications, how many trucks it desires, what other brands the buyer is considering, and, when possible, the prices offered by competitors. Dealers also attempt to gather information on other factors that can affect how great a discount the manufacturer will offer to assist in making the sale. Is the buyer, for example, a Volvo owner who might be more inclined to stay with that brand? Is the buyer seriously considering other brands? How price sensitive is the buyer? Is the buyer a "conquest account," meaning a buyer who has historically purchased another brand?

The dealer passes this information on to the manufacturer, which then considers a host of factors to determine whether and how much of an additional discount off the dealer's standard discount the manufacturer will provide. Some of these factors are industry related, e.g., what is the current demand for trucks? Some are manufacturer related, e.g., how busy is the assembly plant? And some are specific to the particular customer, e.g., how many trucks is the customer expected to buy both now and in the future? Does the customer currently use a competing manufacturer's trucks? Has the customer bought the manufacturer's trucks but is thinking of moving to another brand? Considering all of these factors—some of which are more amenable to calculation than others—the manufacturer provides the dealer with an additional discount, variously referred to as a "competitive price allowance" or a "concession." The result of this process is that on many truck deals to which price assistance programs apply, "dealers never know how much to sell a truck

for until they call factory officials to see how much extra concession they'll allow on the deal."[5]

As Volvo demonstrated at trial, this system does not disadvantage its dealers competing for a particular sale because Volvo has a policy of providing the same discount to dealers working with the same potential buyer. JA 80. That policy is common in the industry. *See Metro Ford Truck Sales, Inc. v. Ford Motor Co.*, 145 F.3d 320, 323 (5th Cir. 1998) (competitive price assistance program managed "to ensure that all Ford dealers bidding the same customer received an equal [competitive price allowance]"). It allows manufacturers to ensure that all their dealers are able to compete with other brands without favoring some of their dealers over others in making a sale to a particular customer. *See id.* (providing dealers on the same bid with the same discount ensured "that all Ford dealers could meet the competition from other original equipment manufacturers").

Thus, a manufacturer's price discount policy has no effect on whether a purchaser decides to buy from any particular dealer of that brand. Instead, the discounts serve only to *reduce* prices of one brand in competition with other brands. They promote *inter*brand price competition—the very type of competition that the antitrust laws principally protect. *See Cont'l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 52 n.19 (1977).

2. Manufacturers in other markets also use differential prices to noncompeting resellers to foster interbrand competition. Similar procompetitive differential pricing occurs in many of the other markets in which *amici*'s members participate. Office furniture manufacturers, for example, market their products in the same way as truck manufacturers, using independent resellers that sell to customers through a competitive bidding process that yields unique sales contracts. Agricultural and construction equipment manufacturers, as well as trailer and intermodal container manufacturers, also generally market their products through a network of authorized dealers. These dealers in turn sell to construction companies, equipment rental firms, agricultural companies, government agencies, mining companies, trucking companies, and other end users. Interbrand competition among manufacturers of similar equipment types is intense. As in the truck market, equipment and trailer buyers typically approach dealers of several brands to negotiate the best bid for a unit or for an entire fleet that meets the end user's specifications. Given the general competitive environment or internal factors, such as a manufacturer's marketing objectives, a manufacturer may decide to offer additional price assistance to its dealer (e.g., a greater discount or favorable financing) in order to obtain that buyer's business. Thus, while the size of the manufacturers in these diverse industries varies greatly, they all share a distribution method that has been adversely affected by the court of appeals' erroneous application of the Robinson-Patman Act in this case.

In fact, countless times every day members of the *amici* and other U.S. manufacturers grant additional discounts to independent resellers in order to secure a customer's order in the face of fierce interbrand competition. Through the use of such discounts—one weapon in the rough and tumble competitive battle—customer brand allegiance is switched and new products and product systems are purchased. The ultimate winner in this battle is the customer, who, having played off one manufacturer against another, is able to secure a lower price.

SUMMARY OF ARGUMENT

The Eighth Circuit's decision, in addition to construing the Robinson-Patman Act in a manner that conflicts with decisions of this Court and of other courts of appeals, fails to recognize the economic realities of the world in which manufacturing companies compete. The type of price competition

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[5] Joseph Bohn, *Truck Dealers Assail Floating-Discount Price System*, AUTOMOTIVE NEWS, April 22, 1991, at 22.

that the Eighth Circuit held illegal, i.e., discounts given to independent resellers to obtain a specific consumer's order, are prevalent in numerous industries, are procompetitive, and are consistent with decades of Robinson-Patman Act jurisprudence. Indeed, this Court and other courts of appeals have recognized that the Robinson-Patman Act does not forbid a manufacturer to offer its resellers differential prices if those resellers are not in actual competition for the same customers.

The Eighth Circuit ignored this basic principle. It instead allowed Respondent, one of Volvo's dealers, to recover because Volvo gave other resellers lower prices in connection with customer sales for which Respondent did not compete and could not have made. Under that approach, a manufacturer that offers a lower price to one of its resellers risks a Robinson-Patman Act violation unless it offers the same price to all its resellers—even those that do not compete for the target customer's business. Because of this risk, most manufacturers will need to reexamine their existing pricing programs, and many will have to change those programs. At a minimum, such an undertaking will impose substantial and unnecessary transaction costs, but, more importantly, the programs that manufacturers are likely to adopt to protect themselves against a Robinson-Patman Act claim like Respondent's will tend to yield higher prices or decreased competition. As a result, the Eighth Circuit's application of the Act is directly contrary to this Court's repeated admonition that "'the Robinson-Patman Act should be construed consistently with broader policies of the antitrust laws.'" *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 220 (1993) (quoting *Great Atl. & Pac. Tea Co. v. FTC*, 440 U.S. 69, 80 n.13 (1979)).

ARGUMENT

I. THE EIGHTH CIRCUIT'S APPLICATION OF THE ROBINSON-PATMAN ACT THREATENS TO IMPAIR PRICE COMPETITION WHEN MANUFACTURERS SELL THROUGH INDEPENDENT RESELLERS.

In affirming the multimillion-dollar damage award in this case, the Eighth Circuit relied almost entirely on discounts Volvo provided in connection with end-user sales for which Respondent, Reeder-Simco GMC, Inc. ("Reeder"), was not competing. Under that approach, a manufacturer may not safely limit its price concession to the competitive circumstances of a particular sale. Instead, whenever a manufacturer considers what price to charge a reseller on a particular deal it must consider the discounts it has made, perhaps up to months earlier, on sales through other dealers to other customers anywhere in the United States.

For example, if a manufacturer elected for competitive reasons to give a discount in connection with a particular bid situation in North Dakota, the Eighth Circuit's decision would arguably require it to give that same discount on all similar trucks sold anywhere in the United States. This result would be compelled even if the manufacturer extended the lower price in North Dakota to fill its order board, capture a high profile fleet, win business away from the manufacturer's competitor, or protect existing business from an aggressively discounting rival.

What is more, at least in the absence of territorial restraints on resale, acceptance of the Eighth Circuit's approach suggests that a plaintiff-reseller can demonstrate harm to competition if a manufacturer fails to give it discounts that are as favorable as those given to other resellers with which the plaintiff did not actually compete. For example, under the Eighth Circuit's application of the Act, a manufacturer exposes itself to Robinson-Patman Act risk if it provides its dealer in Fargo with greater discounts than its dealer in St.

Louis, even if the Fargo reseller's customers would never consider buying from the St. Louis reseller. The Eighth Circuit's reasoning suggests that the St. Louis reseller may state a Robinson-Patman Act claim by alleging—as Reeder did—that if it had only received the more favorable discounts the manufacturer gave the Fargo dealer, it would have lost fewer sales in its locale to dealers of *other brands*, and its profits would also have been greater on the sales it was able to make.

Under this erroneous construction of the Robinson-Patman Act, a manufacturer's only safe course of action is to level all discounts with a higher price. When the manufacturer might otherwise be willing to discount heavily in one instance to try to win business from a rival or keep a factory at profitable usage, the Eighth Circuit's construction of the Act requires it to consider whether it can afford to offer that same discount to dealers everywhere in the country for several months in the future. Unless a manufacturer is prepared to give the same discount to all its resellers—a costly exercise for any manufacturer with a large independent network of resellers—it likely will not give the discount at all.

Professor Hovenkamp has explained this price stabilization effect of restricting selective price discounts in his treatise: "The empirical evidence suggests that when sellers are forbidden from making selective price cuts, they generally respond by making none at all, for giving an across-the-board discount to all buyers is too expensive."[6] "[I]f the market is competitive to begin with," he has noted, an across-the-board price cut "is an unlikely result, for the [manufacturer] will already be operating at only a competitive markup."[7]

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[6] 14 HERBERT HOVENKAMP, ANTITRUST LAW ¶ 2340b1, at 122 (1999); *see also* Daniel P. O'Brien & Greg Shaffer, *The Welfare Effects of Forbidding Discriminatory Discounts: A Secondary Line Analysis of Robinson-Patman*, 10 J.L. Econ. & Org. 296 (1994).

[7] 14 HOVENKAMP, *supra*, ¶ 2340c, at 126.

The Department of Justice has reasoned that similar restrictions on differential pricing caused by most-favored-nations clauses are *anti*competitive.[8] It, too, has concluded that sellers may be discouraged from price-cutting if they must make a lower price available to all other customers.

In fact, antitrust scholars have long recognized the price increasing effect of restrictions on selective discounting. As one commentator remarked a half century ago, "experience teaches that those members of an industry most interested in fostering uniformity of prices, preferably at a high level, may find a ready ally in the Patman Act."[9]

Moreover, manufacturers' selective use of differential prices has been shown to be *pro*competitive. As Professor Cooper has explained, "[s]elected price variations may provide the most efficient method of gathering information

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[8] *See, e.g., United States v. Med. Mut., of Ohio*, 1999-1 Trade Cas. (CCH) ¶ 72,465 (N.D. Ohio Jan. 29, 1999) (consent decree barring enforcement of most-favored-nation requirement); *United States v. Delta Dental of Rhode Island*, 1997-2 Trade Cas. (CCH) ¶ 71,860 (D.R.I. July 2, 1997) (consent decree prohibiting enforcement of most-favored-rates requirement); *United States v. Ore. Dental Serv.*, 1995-2 Trade Cas. (CCH) ¶ 71,062 (N.D. Cal. July 14, 1995) (consent decree prohibiting the adoption or enforcement of most-favored-nation clauses); *United States v. Lykes Bros. S.S. Co.*, 60 Fed. Reg. 52,208 (DOJ Oct. 5, 1995) (consent decree barring enforcement of "automatic rate differential clause"). *See also* Jonathan B. Baker, *Vertical Restraints with Horizontal Consequences: Competitive Effects of "Most-Favored-Customer" Clauses*, 64 ANTITRUST L.J. 517, 529–30 (1996); Arnold Celnicker, *A Competitive Analysis of Most Favored Nations Clauses in Contracts Between Health Care Providers and Insurers*, 69 N.C. L. REV. 863, 883–91 (1991) (describing competitive effects of prohibiting price discrimination and comparing effects of Robinson-Patman Act's ban on price discrimination with the anticompetitive effects of most-favored-nations clauses).

[9] Harry L. Shniderman, *The Impact of the Robinson-Patman Act on Pricing Flexibility*, 57 NW. U. L. REV. 173, 173 (1962); *see generally* O'Brien & Shaffer, *supra*, 10 J.L. ECON. & ORG. 296 (studying welfare effects of secondary-line price discrimination and concluding that forbidding discriminatory discounts results in all retailers paying higher input prices and all retail prices rising).

about demand and thereby improve the opportunities for price competition."[10] Additionally, "[p]rice discrimination may . . . be adopted as one of the most efficient means of competitive promotion. Price reductions may be offered in selected markets or to selected customers for the purpose of inducing experimentation and future sales at nondiscriminatory prices."[11] *Cf. Ball Mem'l Hosp., Inc. v. Mut. Hosp., Inc.*, 784 F.2d 1325, 1340 (7th Cir. 1986) (Easterbrook, J.) (stating that "the control of price discrimination poses substantial risks to competition, which often works through 'discriminatory' chiseling down of prices").

Under the Eighth Circuit's interpretation of the Act, a manufacturer unwilling to abandon selective discounting may have to change its distribution methods substantially to avoid Reeder-like Robinson-Patman Act claims. For example, a manufacturer desiring to continue using selective discounts may be forced to resort to imposing restrictions on where its dealers can sell or eliminating its independent dealer network altogether. While such forms of organization can enhance interbrand competition under certain circumstances, *see Cont'l T.V.*, 433 U.S. at 51–52 (discussing possible efficiencies from vertical territorial restraint), many manufacturers have chosen to sell through independent dealers, presumably calculating that entrepreneurial dealers enhance market penetration in relationship-dominated markets. Many members of the *amici* have decided that they are better able to compete against other manufacturers by allowing potential purchasers to buy from any of their dealers, rather than limiting purchasers to dealers in a particular territory. By allowing the potential purchaser choices among dealers, the manufacturer increases its dealers' incentives to, among other things, market aggressively (including sacrificing their own profit margin to offer lower prices when necessary to capture increased business and build long-term relationships) and to provide superior customer service. The benefits of this competition ultimately inure to the consumer.

[10] Edward H. Cooper, *Price Discrimination and Economic Efficiency*, 75 MICH. L. REV. 962, 975 (1977).

[11] *Id.*

Congress enacted the Robinson-Patman Act in significant part to preserve independent resellers. It would be perverse to extend the Act so broadly that it drives manufacturers to eliminate or substantially curtail those resellers. The Eighth Circuit's affirmance of Reeder's judgment based on sales lost to other manufacturers' dealers has this effect, contrary to both the Act's text and this Court's decisions interpreting it.

II. THE EIGHTH CIRCUIT MISCONSTRUED THE ROBINSON-PATMAN ACT'S COMPETITIVE INJURY REQUIREMENT.

Because the Robinson-Patman Act's prohibitions may be antithetical to the procompetitive aims of the Sherman Act, this Court recognized long ago that the Robinson-Patman Act's reach should not be extended beyond its terms. "[S]implified enforcement of the Act," this Court explained, "might readily extend beyond the prohibitions of the Act, and, in doing so, help give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation." *Automatic Canteen Co. v. FTC*, 346 U.S. 61, 63 (1953).

Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a), the section relied on by Reeder, does not require a manufacturer to offer identical prices for its products to each dealer on every occasion. *See Am. Oil Co. v. FTC*, 325 F.2d 101, 104 (7th Cir. 1963). Instead, § 2(a) prohibits a manufacturer from charging different prices to its dealers only when the effect of the price differences "may be *substantially to lessen competition* . . . or prevent competition *with any person who either grants or knowingly receives the benefit of such discrimination*, or with customers of either of them." 15 U.S.C. § 13(a) (emphasis added). Thus, by its terms, § 2(a) requires a substantial lessening of *competition*—either

at the level of the person granting the discriminatory price (the "primary line") or at the level of the person receiving the discriminatory price (the "secondary line").

In a secondary-line claim, like this one, the relevant competition is *among that manufacturer's resellers*. The Robinson-Patman Act's prohibition on secondary-line price discrimination was intended to remedy the perceived injustice when large chain retail stores used their buying power to extract favorable discounts from manufacturers, then lowered their prices to drive their smaller rivals out of business by stealing customers outright or by forcing the small stores to make unprofitable reductions in their own prices. *See FTC v. Morton Salt Co.*, 334 U.S. 37, 49–50 (1948). Competition (in the secondary-line sense) may be harmed because, regardless of how efficient the small rival is, the price discrimination puts it at a competitive disadvantage.

This is the paradigm for a secondary-line § 2(a) violation. The disfavored reseller must compete with the favored reseller for the same retail customers and lose business or profits *because of* the price discrimination. *Chrysler Credit Corp. v. J. Truett Payne Co.*, 670 F.2d 575, 580 (5th Cir. 1982) (§ 2(a) requires proof that "the likely effect of the alleged price discrimination was to allow a favored competitor to draw significant sales or profits away from him, the disfavored competitor"); *Am. Oil*, 325 F.2d at 104 ("Price discrimination which shifts business between competitors in a 'second line' . . . is . . . a matter with which the statute is concerned."). Unless the plaintiff-reseller proves that it competed with the favored purchaser at the time of the purchases, it cannot demonstrate the competitive harm required by § 2(a). Absent head-to-head competition, price discrimination by a manufacturer could not have caused the disfavored reseller to lose sales or lower its profits. *See, e.g., Lupia v. Stella D'Oro Biscuit Co.*, 586 F.2d 1163, 1170 (7th Cir. 1978) ("Plaintiff must show that he competes with those customers receiving the favored prices.").

Professor Hovenkamp has explained this point:

> The perceived victims of secondary-line discrimination are the seller's disfavored purchasers, who are also generally the plaintiffs in private, secondary-line actions. The theory of injury is generally that the defendant's lower price sales to the plaintiff's competitor (the favored purchaser) placed the plaintiff at a competitive disadvantage and caused it to lose business. This theory necessarily requires the plaintiff to show that it competes with the favored purchaser.[12]

This fundamental requirement—that the disfavored reseller lost sales or profits to favored resellers as a result of the price differential—was effectively eliminated by the Eighth Circuit's conclusion that Volvo's sales to dealers not competing against Reeder for the same customers nevertheless violated the Act. The court of appeals permitted Reeder to recover merely by showing that another dealer received a better price at some other time, in some other place, and in connection with sales to some other customer. In so doing, the court rewrote the Robinson-Patman Act to prohibit manufacturers from lowering prices in order to compete against other brands, unless they give *all* resellers—even resellers that do not compete for the same customers—the same prices.

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[12] HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY § 14.6c, at 581 (3d ed. 2005).

A. Proving Secondary-Line Competitive Injury Requires That the Favored Reseller Compete With the Disfavored Reseller for the Same Customers.

A disfavored reseller can prove "competitive injury" either directly or indirectly. *See Morton Salt*, 334 U.S. at 49. In either event, however, the injury itself must be of a type to which the Robinson-Patman Act applies—i.e., in a secondary-line case, it must be lost sales or profits *caused by* the manufacturer's charging different prices to competing resellers. *See Falls City Indus., Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 434–35 (1983); *see also Richard Short Oil Co. v. Texaco, Inc.*, 799 F.2d 415, 421 (8th Cir. 1986) (no nexus demonstrated between the discriminatory price and plaintiff's injury when plaintiff presented no evidence that it "actually lost sales to [a] competing Texaco station" or that it "lowered its prices and decreased its profits in order to compete with any lower price by a Texaco dealer"); *Ag-Chem. Equip. Co. v. Hahn, Inc.*, 480 F.2d 482, 491 (8th Cir. 1973) (§ 2(a) verdict could not stand where "favored" dealer sold to "customers which were completely unavailable to plaintiff").

The direct method of proving competitive injury requires either (i) evidence that customers chose to buy from the favored reseller because its prices were lower as a result of the discriminatory discount, or (ii) proof that, in order to avoid losing sales to the favored reseller, the disfavored reseller lowered its prices and thereby lost profits. *See J.F. Feeser, Inc. v. Serv-A-Portion, Inc.*, 909 F.2d 1524, 1535 (3d Cir. 1990); *see also Rose Confections, Inc. v. Ambrosia Chocolate Co.*, 816 F.2d 381, 385–86 (8th Cir. 1987). *Cf. J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 564–65 n.4 (1981) (reserving the question whether a private § 2(a) secondary-line plaintiff could ever demonstrate antitrust injury without showing that favored purchasers lowered their prices); *ICC v. United States (ex rel. Campbell)*, 289 U.S. 385, 390–91 (1933) (suggesting in ICC rate discrimination

case, that for price discrimination to cause harm, it must result in the preferred producers lowering their prices and either diverting business from the disfavored shipper or requiring the disfavored shipper to lower its prices by reducing its profit margin).

The indirect method of proving competitive injury requires evidence that for a significant amount of time the manufacturer sold goods to the disfavored reseller for substantially more than it sold the same goods to other resellers in direct competition for the same sales. *See Morton Salt*, 334 U.S. at 50. As this Court stated in *Morton Salt*, "competition *may be* adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods *to the competitors of these customers*." *Id.* (emphasis added).

When it applies, this indirect method provides an alternative means of proving the same potential competitive harm as the direct method: the disfavored reseller lost sales or profits because the discriminatory discount enabled a favored reseller to "steal" customers or forced the disfavored reseller to lower prices unprofitably. It is because the indirect method is intended to prove losses caused by the price discrimination that this Court has instructed, "[i]n the absence of direct evidence of displaced sales, this inference [of competitive injury] may be overcome by evidence breaking the causal connection between a price differential and lost sales or profits." *Falls City Indus.*, 460 U.S. at 435.

It would not be sensible to apply the *Morton Salt* inference when there is only the *possibility* of competition, rather than actual competition. When the disfavored reseller does not actually compete head-to-head with a favored rival for the same customers, there can be no causal connection between the price differential and any lost sales or profits. Absent that connection, the price differential cannot harm competition.

B. The Eighth Circuit Erred in Allowing the Respondent to Prevail Without Evidence of Lost Sales to Competing Volvo Dealers.

Because a § 2(a) secondary-line claim only arises when a manufacturer's price differences disadvantage one reseller in competing for customers with other resellers of that brand, the Robinson-Patman Act does not apply when, as here, a disfavored purchaser did not try to compete for the same sales as the favored purchaser. *See M.C. Mfg. Co. v. Texas Foundries, Inc.*, 517 F.2d 1059, 1066 (5th Cir. 1975); *Best Brands Beverage, Inc. v. Falstaff Brewing Corp.*, 842 F.2d 578, 585–86 (2d Cir. 1987). Even where the favored and disfavored resellers have the ability to sell to the same customers, the disfavored reseller cannot prevail on a § 2(a) claim unless the discriminatory price *caused* its loss:

> [C]ompetitive detriment on the buyer level presupposes a *causal link* between the seller's prices and the impact on customer competition. If the aggressive resale prices or greater profits of a customer said to jeopardize the competition of his rivals are in fact *causally due* to his more efficient operations or are otherwise not *causally connected* with the seller's price differentials, these cannot logically have the "effect of" wreaking whatever hardships may prevail on the customer level.[13]

Reeder, while having a theoretical ability to sell to the same customers as "favored" Volvo dealers, did not *actually* compete with those dealers for the same sales. The absence of such actual competition precluded the jury from finding (contrary to the Eighth Circuit's erroneous conclusion) that the price discrimination caused harm to competition. While these customers *could have* sought bids from Reeder (which is the basis for the Eighth Circuit's holding that Reeder "competed" with the favored dealers), they (with one exception) never did. As a result, Reeder was never a potential seller to these specific customers. Because the Volvo discounts at issue were specific to particular customer price requests, those discounts could not have caused Reeder lost sales or lost profits.

[13] ROWE, *supra*, at 139.

A manufacturer cannot harm competition among its resellers by quoting different deal-specific prices to resellers marketing to distinct customers. Thus, even were the Robinson-Patman Act otherwise applicable in such circumstances, when a manufacturer's price concessions are offered to respond to concession requests from a potential customer, the manufacturer's prices cannot possibly cause competitive harm if the manufacturer offers the same price to all resellers bidding for *that* customer's business. The same rationale applies if the potential customer approaches only *one* of the manufacturer's resellers. In either competitive bidding scenario, no reseller loses sales or profits because the manufacturer favored another reseller with lower priced products.

In fact, before the Eighth Circuit's decision in this case, commentators have generally presumed that "competitive bidding is not subject to the price discrimination proscriptions of the Robinson-Patman Act, since it generally does not result in competitive injury." Neal R. Stoll, *The Paradox of Value: Price Discrimination Under Section 2(a) of the Robinson-Patman Act*, 740 PLI/CORP 169, at 206 (1991).[14] Secondary-line competitive injury requires *actual* competition between the favored and disfavored resellers under circumstances in which the favored reseller derives an advantage from the favorable price it obtained from the manufacturer.

[14] Competitive bidding is also not properly within the purview of § 2(a) because, as Petitioner explains, *see* Pet. Br. at 27–30, such bidding does not meet § 2(a)'s two-purchase requirement. *See also Cool Insulations, Inc. v. Owens-Corning Fiberglass Corp.*, 68 F. Supp. 2d 763 (W.D. Tex. 1998) (adopting *M.C. Mfg. Co.* view that competitive bidders are not "competing purchasers"); *Hancock Paper Co. v. Champion Int'l Corp.*, 424 F. Supp. 285, 287-89 (E.D. Pa. 1976) (competitive bids are outside §2(a)), *aff'd*, 565 F.2d 151 (3d Cir. 1977) (unpublished table decision).

See Infusion Res., Inc. v. Minimed, Inc., 351 F.3d 688, 692 (5th Cir. 2003), *cert. denied*, 124 S. Ct. 2881 (2004) ("plaintiff must first prove that as the disfavored purchaser, it was engaged in actual competition with the favored purchaser(s) as of the time of the price differential" (internal quotation marks omitted)).[15] In competitive bidding situations involving deal-specific discounts, the only resellers that could be affected by a manufacturer's discount are those from which the customer has requested a bid. Thus, as long as a manufacturer offers the same price to all participating resellers, there can be no secondary-line harm to competition in these situations.

C. The Discounts on Which the Eighth Circuit Relied Are Insufficient as a Matter of Law to Support the § 2(a) Award.

By holding that Volvo's price discounts relating to sales that Reeder *could not have made, and indeed, never tried to make*, caused harm to competition, the Eighth Circuit's decision erroneously extends the Robinson-Patman Act to situations in which a particular manufacturer's resellers do not compete for the same customers.

[15] *See also Olympia Co. v. Celotex Corp.*, 597 F. Supp. 285, 297 (E.D. La. 1984) (previous competition irrelevant if purchasers were not competitors at the time of the purchases), *aff'd on other grounds*, 771 F.2d 888 (5th Cir. 1985).

1. Reeder's § 2(a) claim is not supported by direct evidence: Greater discounts to other resellers in other transactions cannot show competitive harm.

The evidence on which the Eighth Circuit principally relied cannot support Reeder's contention that Volvo's different discounts lessened competition—i.e., impaired Reeder's ability to sell trucks against other Volvo dealers. Indeed, Reeder's sole witness testified that it rarely competed with other Volvo dealers (JA 304–05); its competition admittedly came from other truck manufacturers' dealers (*id.* at 304).

Sales lost to other manufacturers' dealers are not evidence of competitive harm. The Eighth Circuit's decision affirms the § 2(a) award principally based on Reeder's contention that had Volvo offered it trucks at the same prices Volvo sold to favored dealers, Reeder would have sold more vehicles (at the expense of dealers of competing truck manufacturers) and would have had bigger profit margins on those sales. *See* Pet. App. 15a–17a. But the "violation-free" state of affairs is not one in which all dealers get the challenged discounts. *See Rose Confections*, 816 F.2d at 394–95.

Manufacturers put to the choice of lowering all prices or none will likely choose to forgo discounting. The court of appeals erred, therefore, when it accepted Reeder's argument that its Robinson-Patman Act claim could be supported by a contention that it suffered "lost profits" because, had it received the more generous concessions Volvo gave other dealers in connection with other customers, Reeder would have made more sales and increased its profits. But the Robinson-Patman Act does not require Volvo to give Reeder the best possible discount. At most, it may at times require that Volvo give Reeder the same discount as others against which Reeder is competing head-to-head. This requirement, however, does not entitle Reeder to claim "lost profits" by contending that it would have made sales it lost to dealers of

other brands or would have made more profit on sales it actually made. In neither instance does Reeder's claimed loss result from its having been impeded by the discounts in its efforts to compete against other Volvo dealers. *Cf. M.C. Mfg. Co.*, 517 F.2d at 1067 (error not to grant defendant directed verdict on § 2(a) claim when evidence showed that plaintiff's purchasers were for a different contract than other dealers' because "[e]ach contract represented a separate, distinct market").

The lost business on which Reeder relied results from *inter*brand competition—it lost sales because potential customers bought other brands of trucks. This has nothing to do with harm to secondary-line competition under § 2 (a). *Compare Universal-Rundle Corp. v. FTC*, 382 F.2d 285, 287 (7th Cir. 1967), and *Nat'l Distillers & Chem. Corp. v. Brad's Mach. Prods., Inc.*, 666 F.2d 492, 496 (11th Cir. 1982).

The one sale Reeder lost to another Volvo dealer is legally insufficient to show competitive harm and cannot support the entire § 2(a) award. The only evidence that Reeder competed for a sale with a dealer to which Volvo, according to the Eighth Circuit, gave a better discount involves the Hiland Dairy sale. *See* Pet. App. 4a, 16a. Even were the Eighth Circuit's characterization of the Hiland Dairy transaction correct,[16] this one sale alone—twelve trucks out of over 5000 trucks that Reeder claimed it attempted to sell (JA 77–79)—is a legally insufficient basis from which to infer competitive harm. *See Int'l Film Ctr., Inc. v. Graflex, Inc.*, 427 F.2d 334, 336 (3d Cir. 1970) (mere price differential in single isolated transaction did not constitute a Robinson-Patman Act violation); *Am. Oil*, 325 F.2d at 106 (§ 2(a) claim requires "something more than an essentially temporary minimal impact on competition"). And, even if this one sale (for which Reeder claimed lost profits of $30,000) could be the linchpin of Reeder's § 2(a) claim, it cannot support the damages awarded (over $1.3 million before trebling). *See Rose Confections*, 816 F.2d at 395.

[16] Petitioner's brief explains that Volvo initially provided Reeder and the competing Volvo dealer with the same discount in quoting a price to Hiland Dairy. *See* Pet. Br. at 7. Volvo increased the discount, by a mere one percent, only after Hiland Dairy decided to purchase from the other dealer and then demanded a greater discount to compensate for an intervening increase in the base price. *Id.* Under these circumstances, Volvo's increased discount could not have caused harm to competition or to Reeder.

2. The transactions at issue do not support an inference of injury to competition.

The Eighth Circuit's decision also does not identify indirect proof of competitive injury, i.e., evidence from which the jury could permissively *infer* competitive injury, using the approach in *Morton Salt*.

With the exception of Hiland Dairy, Reeder's potential customers did not purchase from other Volvo dealers. And there is little possibility that Reeder lost unidentified customers to other Volvo dealers because they received greater concessions from Volvo. Trucks, unlike, e.g., table salt, are not purchased casually from a corner store. Truck purchasers seek out specific dealers with which they work to determine the individual truck specifications that meet their needs. Only after specifications are chosen and the dealer contacts the manufacturer for a price concession does the dealer propose a price. Thus, it would be incredible to suppose that any unidentified truck purchaser chose a Volvo dealer other than Reeder because it knew—even without requesting Reeder to bid—that the other Volvo dealer would have better prices. The fact that the differences in price concessions (on different deals) were "small," which the Eighth Circuit acknowledged (Pet. App. 17a), only makes it more incredible that those differences caused Reeder to lose unidentified customers to other Volvo dealers.

If a manufacturer's resellers do not actually compete for the same customers, inferring secondary-line competitive harm from the manufacturer's differential discounts is illogi-

cal. Absent actual competition among resellers, a manufacturer's price differential cannot be presumed either to have caused a disfavored reseller to lose sales to the favored reseller or to lose profits by lowering its resale price. Reeder did not show that it actually competed for the same customers as favored Volvo dealers; thus, there is no basis from which to infer this competitive harm.

III. VOLVO'S INTENT TO USE FEWER DEALERS IS IRRELEVANT TO COMPETITIVE INJURY.

In addition to applying an erroneous analytical framework in considering whether there was objective evidence of competitive injury, the Eighth Circuit also erred in relying on Volvo's supposed intent to reduce its dealer numbers as a basis for inferring a lessening of competition. In the course of concluding that the evidence supported a finding of competitive harm, the court noted Volvo's acknowledgment that it had sought to reduce its number of authorized dealers and concluded that "[f]rom this evidence, the jury could properly infer Volvo's intent to reduce the number of its dealers manifested itself in the discriminatory concession practices." Pet. App. 16a. This erroneous reliance on "intent" evidence is incompatible with this Court's general antitrust jurisprudence and has potentially harmful ramifications for any manufacturer that decides to reconfigure its distribution network.

While evidence of intent may be relevant to Sherman Act claims when predation is at issue, *see Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602 (1985), it has no place in proving a § 2(a) Robinson-Patman Act claim. Section 2(a) claims "must always focus on injury to *competition*." *Motive Parts Warehouse v. Facet Enters.*, 774 F.2d 380, 395 (10th Cir. 1985). Evidence of Volvo's intent to eliminate Reeder as a dealer suggests nothing about whether Volvo engaged in price discrimination that caused the necessary harm to competition. Even if Volvo had charged Reeder higher prices in an effort to remove Reeder from the dealer ranks, nothing in the court of appeals' decision suggests that

Reeder's disappearance would have altered the level of competition among Volvo dealers.

More importantly, manufacturers change their distribution networks to increase their ability to compete against other manufacturers. They have nothing to gain by punishing efficient dealers, because they, not their dealers, are the ultimate losers when efficient dealers are lost or inefficient dealers retained. Additionally, as discussed above, selective discounting is often a means by which firms engage in interbrand competition that drives down prices to consumers. Consequently, as in other antitrust areas, a manufacturer's "intent"—either to make changes in its distribution system or to engage in "discriminatory" discounts—is irrelevant to whether particular pricing decisions caused competitive injury. *Cf. NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 138 (1998) (defendant's motive irrelevant to application of the per se rule); *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1402 (7th Cir. 1989) (stating that "intent is not a basis of liability (or a ground for inferring the existence of such a basis) in a predatory pricing case under the Sherman Act").

What is more, by considering Volvo's plans to reduce its dealer force as evidence of competitive harm, the Eighth Circuit's decision creates a risk that changes in distribution schemes and procompetitive price discounting may result in antitrust liability. This poses a serious risk of deterring manufacturers from engaging in competitively beneficial conduct.

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The Robinson-Patman Act has long been criticized. As Assistant Attorney General R. Hewitt Pate, head of the Antitrust Division, recently wrote, "Virtually every antitrust commentator who has examined this Act has concluded that it is inconsistent with effective competition policy and is anti-consumer." Letter from R. Hewitt Pate, Asst. Att'y Gen., U.S. Dept. of Justice, Antitrust Div., to Deborah A.

Garza, Chair, Antitrust Modernization Commission (Jan. 5, 2005), *available at* http://www.usdoj.gov/atr/public/comments/207122.htm. *See also* ROBERT H. BORK, THE ANTITRUST PARADOX, 385 (1978) ("The fact is that no other antitrust statute has been subject to so steady a barrage of hostile commentary as the Robinson-Patman Act."). Even if "anticompetitiveness and business inefficiency are built into [the Robinson-Patman Act]," *id.*, the Eighth Circuit's decision, which one commentator has accurately described "as a tortuous journey through § 2(a),"[17] threatens to increase substantially the anticompetitiveness and business inefficiencies in many markets, including those in which *amici* participate. The central flaw in the decision is its focus on the injury to an individual competitor divorced from any injury to competition caused by the price discrimination. As elsewhere in antitrust, injury to competition is the § 2(a) touchstone:

> [I]t is not "injury" *to competitors* but adverse effects on "competition *with*" parties privy to discriminations that the statute expressly forbids. Hence we believe that criteria of competitive effect which focus exclusively on individual competitors' sales or profits rather than the health of the competitive process literally go beyond the terms of the law.[18]

In affirming the treble damages in Reeder's favor, the Eighth Circuit focused exclusively on *Reeder's* sales and profits rather than on whether Volvo engaged in price discrimination that harmed competition among its dealers. This Court should correct this error, which affects how manufacturers across the nation price their products. Rather than allow Robinson-Patman Act claims like Reeder's that "go beyond the terms of the law," this Court should reaffirm that

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[17] WILLIAM C. HOLMES, ANTITRUST LAW HANDBOOK § 1:6 (Nov. 2004).

[18] ROWE, *supra*, at 131–32 (quoting Report of the Attorney General's National Committee to Study the Antitrust Laws 164–65 (1955)).

such claims require harm to *competition*. It should further hold that harm to competition in a secondary-line Robinson-Patman Act case requires, at a minimum, (a) that the plaintiff-reseller actually have competed with the favored reseller for the same end-user sales during the period in which the manufacturer provided the discriminatory discount, and (b) direct or inferential evidence that the plaintiff-reseller lost sales to the favored reseller or incurred lost profits as a result of reducing its resale price to combat the favored reseller's lower price.

CONCLUSION

This Court should reverse the judgment below.

Respectfully submitted,

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